

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

RICHARD METZGER, *Applicant*

vs.

**CALIFORNIA STATE UNIVERSITY FRESNO, permissibly self-insured;
Administered by SEDGWICK CLAIMS, *Defendants***

**Adjudication Number: ADJ9775364
Fresno District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration of the "Findings of Fact, Award, Order, and Opinion on Decision" (F&A) issued on February 25, 2021, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.¹ This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant sustained industrial cumulative injury to the bilateral knees while working as a plumber through February 5, 2014. The WCJ further found that parties previously agreed to stipulations at 51% permanent disability, which reflected a compromised rating on the issues of apportionment and rebuttal of the Combined Values Chart (CVC). The WCJ found good cause to reopen the prior stipulation and found that applicant's present disability is 74% after apportionment and after application of *Kite*. (*East Bay Municipal Utility District v. Workers' Compensation Appeals Board (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.).)

Defendant contends that the WCJ erred because the right knee sustained new and further disability of 18% and thus the prior award of 51%, even with application of *Kite*, could at most be 69% (51% + 18%).

¹ Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been substituted in her place.

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the February 25, 2021 F&A and return this matter to the trial level for further proceedings.

FACTS

Applicant sustained an admitted cumulative injury through 2014 to his bilateral knees while working as a plumber. (Minutes of Hearing and Summary of Evidence, November 18, 2020, p. 2, lines 3-5.)

The parties entered stipulations with an award issuing on November 2, 2017. (Defendant's Exhibit B, Stipulations with Request for Award, November 2, 2017.) The parties stipulated that applicant's permanent disability rated to 51%. (*Id.* at p. 6.)

The stipulations were based upon the reporting of the agreed medical evaluator (AME) who found chondromalacia and assigned 22% whole-person impairment (WPI) to the left knee and 12% WPI to the right knee. (Report of AME Daniel Ovadia, M.D., March 22, 2016, p. 6.)² The AME also found 15% non-industrial apportionment. (*Ibid.*) In supplemental reporting, the AME concluded that applicant's knee impairments had a synergistic effect, which warranted rebuttal of the combined values chart (CVC). (Report of AME Daniel Ovadia, M.D., June 1, 2016, p. 1.) Dr. Ovadia stated:

Recall that Mr. Metzger has significant dominantly post-traumatic (cumulative trauma) arthritis in both of his knees. Utilizing a strict interpretation of the AMA Guides, I *combined* these two values (left knee -22% WPI; right knee - 12% WPI) and arrived at a 31% WPI.

However, having reviewed the Kite decision, I do believe the two knees have a synergistic effect on one another such that the disability/impairment is greater than the sum of the parts. Therefore, I believe a more accurate depiction of Mr. Metzger's overall knee disability would be to *add* the two impairment ratings together (22% WPI + 12% WPI) resulting in 34% WPI, rather than to *combine* the two.

(*Ibid.*)

² Although the earlier reporting of the AME is not marked as an exhibit it is deemed admitted into evidence by operation of law. (Cal. Code Regs., tit. 8, § 10803(b).)

The Disability Evaluation Unit (DEU) corrected the initial ratings to 20% WPI and 10% WPI respectively. (See, Defendant's Exhibit C, DEU Consultative Rating, June 12, 2017.) Depending upon application of apportionment and CVC rebuttal, applicant's rating ranged from 48% to 68%. (*Ibid.*)

The 2017 stipulation states the reason for the 51% rating as follows:

THE PARTIES ACKNOWLEDGE RATING DISPUTES EXIST BASED UPON APPORTIONMENT, STRING ANALYSIS, AND THE KITE DECISION. PARTIES HAVE AGREED TO COMPROMISE THE SPLIT RATINGS DISPUTES AT MID-POINT OF 51%, NOTING GOOD FAITH, GENUINE LEGAL DOUBT ABOUT WHETHER A HIGHER OR LOWER RATING WILL APPLY POST-TRIAL. PARTIES PREFER TO COMPROMISE THE RATING AND WAIVE LABOR CODE SECTION 5313.

(Defendant's Exhibit B, *supra* at p. 7.)

Applicant filed a petition to reopen on January 17, 2019, stating that his symptoms had worsened. (Defendant's Exhibit A.)

After reevaluation, applicant's right knee chondromalacia was found to have worsened and warranted a rating of 20% WPI. (Applicant's Exhibit 3, Deposition of AME Daniel Ovadia, M.D., April 30, 2020, p. 14, lines 3-14.) The AME again concluded, without explanation, that *Kite* should apply in this case. (*Id.* at p. 16, lines 2-3.)

The WCJ issued findings applying *Kite* and apportionment and rated applicant's disability to 74%. (F&A, *supra*.)

DISCUSSION

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476-478 (Appeals Board en banc).) As required by section 5313 and explained in *Hamilton*, "... the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

The Appeals Board has a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79

Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

To constitute substantial evidence “. . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) “When the foundation of an expert’s testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions.” (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

Section 4663 requires any report addressing permanent disability to address apportionment of disability. Defendant carries the burden of proof on apportionment. (§ 5705.) Apportionment of permanent disability must address causation of disability and must constitute substantial evidence. (*Escobedo, supra*, 70 Cal.Comp.Cases at pp. 611, 620-621.)

In a recent en banc decision, the Appeals Board clarified the process for rebutting the CVC.

One element of the PDRS is the Combined Values Chart (CVC). The purpose of the CVC is described within the PDRS, which cites to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides), which is adopted and incorporated for purposes of rating permanent disability under the 2005 PDRS. (Lab. Code, §§ 4660, 4660.1; Hoch, Andrea, Schedule for Rating Permanent Disabilities, (2005), p. 1-11; AMA Guides, pp. 9-10.) In sum, impairment under the AMA Guides is designed to reflect how a disability affects a person's activities of daily living ("ADLs") (self-care, communication, physical activity, sensory function, non-specialized hand activities, travel, sex, and sleep). (AMA Guides, pp. 2-9.) CVC “values are derived from the formula $A + B(1-A)$ = combined value of A and B, where A and B are the decimal equivalents of the impairment ratings.” (AMA Guides, p. 604.)⁵

Impairments to two or more body parts are usually expected to have an overlapping effect upon the activities of daily living, so that generally, under the AMA Guides and the PDRS, the two impairments are combined to eliminate this overlap.

(*Vigil v. County of Kern*, 2024 Cal. Wrk. Comp. LEXIS 23 at *7-8, (Appeals Board en banc).)

The Combined Values Chart (CVC) in the Permanent Disability Ratings Schedule (PDRS) may be rebutted and impairments may be added where an applicant establishes the impact of each impairment on the activities of daily living (ADLs) and that either:

(a) there is no overlap between the effects on ADLs as between the body parts rated; or

(b) there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs.

(*Id.* at *13.)

Here the QME has conducted no significant analysis to justify rebuttal of the CVC. The opinions contained within the medical reporting are conclusory and provide no indication for why the QME reached the conclusion that he did. As explained in *Vigil*, the QME must provide a reasoned analysis to rebut the CVC, and that analysis must constitute substantial medical evidence. Accordingly, the present award of permanent disability is not supported by substantial medical evidence and must be rescinded.

As to the issue of applicant's petition to reopen, there are multiple methods upon which either party may be able to modify a prior stipulation. First, defendant may file a petition to reduce the disability awarded. (Lab. Code³, §§ 5803, 5410.1.) Next, applicant may file a petition to increase the disability award where new and further disability exists. (§ 5410.) Section 5410 states, in pertinent part: "Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused **new and further disability**." (§ 5410, (emphasis added).)

Another ground for modifying a prior stipulation is good cause: "The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of [Division 4] . . . At any time, upon notice and after the opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision or award, **good cause appearing therefor**." (§ 5803, (emphasis added).)

³ All future references are to the Labor Code unless noted.

Here, applicant alleges to have sustained new and further permanent disability. Defendant argues that applicant has only sustained 18% *new and further* disability to the right knee. Defendant further argues that even with application of *Kite*, adding the 18% new and further disability to the prior stipulation of 51% disability equals 69% disability, and not 74% as found by the WCJ. However, to resolve this rating dispute, we must first have substantial medical reporting upon which a rating may issue. As we are rescinding the award, we will defer at this time the calculation of applicant's new and further disability.

Accordingly, as our Decision After Reconsideration we will rescind the February 25, 2021 F&A and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award, Order, and Opinion on Decision issued on February 25, 2021, is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 9, 2025

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**RICHARD METZGER
GARY HILL
DUNCAN CASSIO**

EDL/mt

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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